Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-660

HUGH OTIS BYNUM, JR.

Petitioner,

VS

THE STATE OF ALABAMA

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

WILLIAM J. BAXLEY
Attorney General of Alabama

JAMES S. WARD
Assistant Attorney General of Alabama

WALTER S. TURNER
Chief Assistant Attorney General
of Alabama

ATTORNEYS FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1977

NO. 77-660

HUGH OTIS BYNUM, JR.

Petitioner,

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Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is reported as *Bynum v. State* in Ala. Cr. App. 348 So.2d 804 (1976). Petition for Writ of Certiorari, upon preliminary examination, was granted by the Alabama Supreme Court on November 5, 1976. After the submission of Briefs and Oral Argument, a unanimous Alabama Supreme Court, without opinion, quashed the writ as improvidently granted on August 12, 1977. This judgment and order of the Alabama Supreme Court is reported as *Ex Parte Bynum* in Ala. 348 So. 2d 828 (1977)

JURISDICTION

The petitioner has applied to this Honorable Court for a Writ of Certiorari to review the judgment of the Alabama Court of Criminal Appeals rendered on June 29, 1976.

Petitioner applies for this Writ of Certiorari pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent submits there are no constitutional provisions involved because none of Petitioner's constitutional rights were in any way denied, abridged, infringed or violated, either at the trial or appellate level in Alabama. Consequently, this Honorable Court would not have jurisdiction to review the judgments of the Alabama appellate courts nor would Petitioner have any claim of entitlement to that review.

Be that as it may, Petitioner alleges that the following constitutional and statutory provisions are involved:

The Sixth Amendment to the Constitution of the United States which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

The Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law; or

> deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *

28 U.S.C. § 1257(3) which provides in pertinent part:

> State courts; appeal; certiorari. Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of . . . the United States.

Section 12-22-130, Code of Ala. 1975 which provides in pertinent part:

> A person convicted of a criminal offense in the circuit court, or other court from which an appeal lies directly to the supreme court or court of appeals, may appeal from the judgment of conviction to the supreme court or court of appeals, as the case may be.

Respondent submits the following statutory and Alabama constitutional provisions are also involved:

Alabama Constitution of 1901, Amendment No. 328, §6.03 which provides in pertinent part:

> (a) The court of criminal appeals shall consist of such number of judges as may be provided by law and shall exercise appellate jurisdiction under such terms and conditions as shall be provided by law and by rules of the supreme court.

Section 12-3-9, Code of Ala. 1975, which provides in pertinent part:

> The court of criminal appeals shall have exclusive appellate jurisdiction of all misdemeanors, including the violation of town and city ordinances, habeas corpus and all felonies, including all post conviction writs in criminal cases.

QUESTIONS PRESENTED

1. Is there a denial of a criminal defendant's Sixth Amendment right to trial by an impartial jury when a juror has allegedly private communications with third persons which in no way deal or relate to any matter pending before the jury and where the State of Alabama fully meets its burden by affirmatively demonstrating at a post trial hearing that the alleged private conversations did not in any way pertain or relate to any matter before the jury and in no way brought to bear any improper influences on the jury or prejudiced the criminal defendant's right to a fair trial?

2. Does the Fourteenth Amendment or any of the rights thereunder require that the Alabama Supreme Court, in quashing a Writ of Certiorari as improvidently granted, write an opinion dealing with issues previously raised in the Alabama Court of Criminal Appeals, that court having written an opinion which fully addressed, considered and decided those very issues, and when on certiorari the Alabama Supreme Court sits only to review decisions of the Alabama Court of Criminal Appeals?

3. Is a criminal defendant a victim of invidious dis-

crimination where the Alabama Supreme Court, in quashing as improvidently granted a Writ of Certiorari, does not write an opinion dealing with issues already raised in the Alabama Court of Criminal Appeals, that court having written an opinion fully addressing, considering and deciding those very issues?

4. Is a criminal defendant a victim of invidious discrimination or are his Fourteenth Amendment rights violated when the Alabama Court of Criminal Appeals, an appellate court having exclusive jurisdiction of all felonies, adversely decides issues and substantial questions of law to him after fully addressing, considering and analyzing all the issues and substantial questions of law presented by applying the law to the facts and testimony in the case.

STATEMENT OF THE CASE

Petitioner was indicted by the Jackson County, Alabama Grand Jury on March 10, 1975 for the offense of Assault with Intent to Murder. The indictment was based on Petitioner's involvement as the ringleader in a conspiracy to murder four prominent citizens of Scottsboro, Alabama, including the Mayor of Scottsboro, the District Attorney of Jackson County, Alabama, and the Sheriff of Jackson County, Alabama. As part of this conspiracy, dynamite was placed under the hood of a local Scottsboro attorney, W. Loy Campbell, who is now Circuit Court Judge for Jackson County, Alabama.

Upon starting his car, there was a terrific explosion resulting in the loss of both of Judge Campbell's legs. It is for this dastardly deed that Petitioner was indicted and convicted by a jury of his peers.

Petitioner was duly and properly arraigned, pleading not guilty to the charge against him.

Petitioner's trial began on March 24, 1975 before a duly empaneled and sworn jury of his peers. On March 31, 1975 the jury found Petitioner guilty of Assault with Intent to Murder as charged in the Indictment. Punishment was fixed by the trial court at twenty years imprisonment in the State Penitentiary of Alabama, the maximum punishment for the offense charged.

Petitioner filed a Motion for a New Trial on April 30, 1975 alleging, *inter alia*, that a separation of the jury occurred with resulting prejudicial private communications by one of the jurors. After an extensive hearing on this motion, the same was overruled and denied on August 21, 1975.

Petitioner's conviction was affirmed by the Alabama Court of Criminal Appeals on June 29, 1976. An Application for Rehearing was denied on August 24, 1976, although the opinion of the Court of Criminal Appeals was briefly extended.

Petitioner filed a Writ of Certiorari with the Alabama Supreme Court which was, after preliminary examination, granted on November 5, 1976. Briefs were submitted by both sides and oral arguments were heard. Thereafter, on August 17, 1977, the Alabama Supreme Court, without opinion, quashed the writ as being improvidently granted.

On August 25, 1977 Petitioner filed with the Alabama Supreme Court a Motion For Opinion. Said motion, after having been duly considered by the Alabama Supreme Court, was denied on August 21, 1977.

In his Statement of the Case, Petitioner coyly and cun-

ningly inserts matters that are not argued by him as reasons for granting the writ. This is done in an apparent attempt to show unto this Court what he feels was prejudicial and erroneous treatment and decision making in all the courts below. Since these matters are not properly raised and submitted in the Argument portion of his Petition or properly outlined as questions presented for review to this Court, Respondent does not deem it necessary or proper to answer these contentions. It is enough that these issues were all raised in the two lower appellate courts and were, after full consideration and study, decided adversely to Petitioner.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S SIXTH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY WAS NOT DENIED OR VIOLATED IN THIS CASE AS THE ALLEGED PRIVATE COMMUNICATION BY THE JUROR DID NOT RELATE TO ANY MATTER PENDING BEFORE THE JURY AND THE STATE OF ALABAMA FULLY MET ITS BURDEN BY AFFIRMATIVELY DEMONSTRATING THAT THE ALLEGED PRIVATE COMMUNICATION DID NOT PREJUDICE PETITIONER AND WAS HARMLESS TO HIM.

Petitioner's initial reason for the granting of the writ is highlighted by emotional rhetoric and platitudinal conjecture. He fails to set out the circumstances surrounding the alleged impermissible communication or its substance. Rather, Petitioner asserts only the conclusion that there was communication between a juror and a third party and that the State failed to meet its burden in negating any resulting prejudice.

Quite to the contrary, as the facts elicited at the motion

for new trial in state court and pertinent case law demonstrate, no prejudice resulted to Petitioner by the complained of communication. Neither the pending criminal case nor any issue involving it was discussed. The complained of contact was, unequivocally, harmless.

The Opinion Below

To be dealt with at the outset is Petitioner's unwarranted assertion that the Court of Criminal Appeals of Alabama refused to address and write to his claims involving alleged juror misconduct and the alleged denial of his Sixth Amendment rights. Regardless of this assertion, or what Petitioner imagines the situation to be, his complaint is really with the result. Why? Because the Court of Criminal Appeals considered these issues but decided them adversely to him. In reaching this decision, the Court of Criminal Appeals considered and analyzed the testimony of all twelve jurors on the motion for new trial, the substance of any conversations had by them with third persons, and the impact or effect of these conversations on them. After conducting this thorough and erudite process, the court concluded that (1) none of the conversations between jurors and third persons was concerned with or related to the pending case or the issues involved; and (2) the State of Alabama fully met its burden by showing that no improper influences were brought to bear on the jury or any member thereof and that Petitioner was not prejudiced in any way.

The efficacy of the court's consideration and analysis of this issue is best demonstrated by their own words:

> The trial judge held a full hearing on this motion at which nine of the twelve jurors appeared

> and testified. *Each of these in essence stated that they had not been subjected to any outside influence whatever during trial nor had they conversed with any persons pertaining to the trial nor read any newspaper or other publications or heard any television or radio broadcasts while serving as jurors.*
>
> As to the remaining three jurors, two of these were ill and one away on vacation at the time of the hearing on this motion. Each of these three jurors subsequently filed affidavits setting forth that they, too, had not been subjected to any outside influence whatsoever, nor had they heard the case discussed, nor read any periodicals, nor heard any radio or television broadcasts. No counter affidavits were filed by appellant. In brief, one juror related that he had received a telephone call from his office pertaining to some business equipment and a second juror had received a call pertaining to some extra clothing and had inquired as to the status of his mother-in-law's condition, she being ill.
>
> *We are of the opinion that the State of Alabama here fully met its burden of showing that no improper influences were brought to bear upon the jury or any member thereof, and the motion for new trial was, therefore, properly overruled. . . .* (Cases omitted) (Emphasis added)

Bynum v. State, Ala. Cr. App., 348 So.2d 804, 827 (1976) Writ Quashed, *Ex Parte Bynum*, Ala. 348 So. 828 (1977).

Burden On State When Improper Communication Allegedly Occurs

In Alabama the law is clear in defining the burden on

the State once a separation of the jury or alleged private communications between a juror and a third party occur. The State must affirmatively show that the defendant was not injuriously affected, i.e. that he was not prejudiced. This burden and what it encompasses was eloquently explained by the Alabama Supreme Court in *King v. State*, 266 Ala. 232, 236, 95 So.2d 816 (1957):

> There is no doubt that in Alabama a separation of the jury after the trial has been entered upon and before verdict, creates a ground for reversible error in favor of the defendant unless the State affirmatively shows that the defendant was not thereby injuriously affected. In other words, the separation of the jury does not establish an absolute right to have a mistrial declared or a new trial granted but prejudice must result therefrom in order for a new trial to be granted. The right of the defendant in this respect is only prima facie and when a separation is shown, *the burden is on the prosecution to establish affirmatively that the separating jury or juror conversed with no one as to the defendant's guilt and that no other influences were brought to bear on the jury or any of its members which might have biased their deliberations.* . . . (Cases omitted) (Emphasis added)

The burden on the government in federal courts is almost identical to that of the State in Alabama. When an unauthorized private communication, contact, or tampering with a juror during a trial does not relate to a matter pending before the jury, there is no right to a new trial absent a showing of prejudice by the defendant. *United States v. Brasco*, 516 F.2d 816, 819 (2nd Cir. 1975). When

an unauthorized private communication, contact or tampering, directly or indirectly, with a juror during the trial does in fact *relate to a matter pending before the jury*, the communication is presumed prejudicial and a new trial must be granted unless the government can establish at a hearing that the contact with the juror was harmless to the defendant. *Remmer v. United States*, 347 U.S. 227, 98 L.Ed. 654, 656, 74 S. Ct. 450 (1954); *United States v. Brasco*, 516 F.2d 816, 819 (2nd Cir. 1975).

It is evident that in the federal courts the burden shifts depending on the nature of the communication. If it related to a matter pending before the jury it is on the government. If it did not, it is on the defendant. In Alabama, the burden is *always* on the State once a communication is shown, regardless of its nature or substance. We will see in this case that the alleged communication did not relate to any matter pending before the jury. Consequently, the State here had a burden it would not have had if this communication would have occurred in the federal courts. Be that as it may, and as correctly found by the Court of Criminal Appeals, the State fully met its burden and demonstrated the complete absence of prejudice. *Bynum v. State*, Ala. Cr. App., 348 So.2d 804, 827 (1976) Writ Quashed, *Ex Parte Bynum*, Ala. 348 So.2d 828 (1977).

The Private Communication

The complained of occurrence involved a juror by the name of John Wann. Mr. Wann, along with the remainder of the sequestered jury, was lodged at the Holiday Inn in Scottsboro, Alabama. One night during the trial, Mr. Wann visited the hotel room of an acquaintance from work. While there, the acquaintance, not Mr. Wann, received a telephone

call, Mr. Wann speaking briefly to the individual on the telephone. After this telephone call, Mr. Wann admittedly called his wife and briefly spoke to her. However, as Mr. Wann's testimony on Petitioner's motion for new trial unquestionably demonstrates, Mr. Wann did not talk with any of these individuals about any matter pending before the jury or any issues involved in the case.

The occurrences and their impact on Mr. Wann are best explained by him. From the record:

1. Mr. Wann talked to an acquaintance with whom he worked in the acquaintance's room. (R. 835, A2).

2. That some friends called his *acquaintance*. (R. 835, A2-A3). These individuals were identified as ". . . some of the guys that works with the test board at Huntsville, that works with this friend of mine." (R. 835, A2). Mr. Wann stated they called to see what his acquaintance was up to because they knew *he* was there. (Emphasis added)

3. The only thing Mr. Wann said to the people on the telephone was "hello" or in his words, ". . . so he just handed me the phone and said, *'Here, say hello to them', and that is basically all I said to them.*" (R. 836, A3) (Emphasis added).

4. Mr. Wann then called his wife to say "hello", the conversation lasting only thirty seconds. (R. 836, A3).

5. Mr. Wann stated that his friend, to whose room he went, *did not mention the trial to him at all.* (R. 838, A5). (Emphasis added)

6. Mr. Wann stated that no one on the telephone he

talked to *mentioned the trial at all.* (R. 838, A5) (Emphasis added)

7. In response to the question of whether he talked to any of these people about the trial Mr. Wann stated, *"Not one word at all."* R. 838, A5) (Emphasis added)

8. Mr. Wann stated that he did not know of anyone discussing anything about the case, that no one other than fellow jury members discussed the case with him during the week he served on the jury. (R. 836, 837, A3-A4).

Not to be overlooked, and as noted by the Court of Criminal Appeals, all the other members of the jury testified orally or by affidavit at Petitioner's motion for new trial hearing. Each testified that they had no conversation pertaining to the trial or on any matter before them, including the guilt or innocence of Petitioner. They all stated that they had not been subjected to any outside influence whatever during the trial. *Bynum v. State*, Ala. Cr. App., 348 So.2d 804, 827 (1976) Writ Quashed, *Ex Parte Bynum*, Ala. 348 So.2d 828 (1977).

What does Mr. Wann's testimony and that of the other jurors conclusively show? THAT JOHN WANN DID NOT DISCUSS THE TRIAL AT ALL WITH ANYONE EXCEPT THE OTHER JURORS. HE SAID *ONLY HELLO* TO HIS WIFE AND THE BOYS FROM THE TEST BOARD AT HUNTSVILLE. (R. 836, A3). HE STATED HIS FRIEND DID NOT MENTION THE TRIAL AT ALL AND THAT NO ONE HE TALKED TO ON THE PHONE MENTIONED THE TRIAL AT ALL. (R. 837-838, A4-A5). MR. WANN SAID, "NOT ONE WORD AT ALL" ABOUT THE TRIAL TO ANYONE HE TALKED TO. (R. 838, A5). More importantly, this testimony shows conclusively that nothing re-

lating to any matter before the jury was discussed, that Petitioner's guilt or innocence was in no way discussed and that no other influences were brought to bear on the jury or any of its members which might have biased their deliberations. Regardless of how it is stated, or regardless of whether the burden in the State of Alabama or in the federal courts is applied, the State affirmatively demonstrated that no prejudice resulted to Petitioner from the private communication. At best, these were but harmless encounters that in no conceivable way violated, infringed or denied his Sixth Amendment rights.

Applicable Case Law

After the factual showing elicited above, the Respondent could stop and be rest assured that this Honorable Court would conclude that the complained of communication did not result in any prejudice to Petitioner nor deny him of any of his Sixth Amendment rights. But coupled with this factual showing are the many hundreds of cases which reach the same result as did the Court of Criminal Appeals of Alabama herein; these cases alternatively holding that criminal defendants were not denied a fair trial, were not denied their rights under the Sixth Amendment, or prejudiced in any way. For purposes of this response, Respondent will only discuss and cite a representative sampling from these multitude of cases.

To begin with, it must be remembered that Petitioner filed a motion for a new trial and was given a full evidentiary hearing pursuant to that motion. At this hearing, the question of the juror's alleged misconduct and alleged private conversations were fully explored and considered. (R. 813-860) After hearing and observing the witnesses, who were

all members of the jury, the able trial judge denied the motion for new trial and concluded the State met its burden of affirmatively demonstrating no prejudice to Petitioner as the result of Wann's private conversation. (R. 865-867).

Of course, the trial judge was in far better position to judge the effects of the complained of incident after having the opportunity to observe the witnesses. Consequently, his decision denying the motion for new trial should not be disturbed unless there appears a clear abuse of discretion. *United States v. Love*, 535 F.2d 1152 (9th Cir. 1976); *United States v. Short*, 500 F.2d 676 (9th Cir. 1974), cert. den. 419 U.S. 1000, 42 L.Ed.2d 275, 95 S.Ct. 317 (1974); *United States v. Brandenburg*, 162 F.2d. 980 (3rd Cir.) cert. den. 332 U. S. 769, 92 L.Ed.2d 354, 68 S.Ct. 80 (1947). Likewise, the law in Alabama is that in reviewing the denial of a motion for a new trial the reviewing court will indulge every presumption in favor of the correctness of the ruling of the trial judge and the decision thereon rests largely within the sound discretion of the trial court. *Moore v. State*, 52 Ala. App. 179, 290 So.2d 246 (1974); *Johnson v. State*, 51 Ala. App. 172, 283 So.2d 624 (1973). Moreover, this rule has been extended to new trial hearings dealing with juror misconduct and alleged private communications. *Melton v. State*, 26 Ala. App. 265, 158 So. 196 (1934).

Petitioner relies on this Court's decision in *Remmer v. United States*, 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450 (1954) to bolster his argument that his Sixth Amendment rights were violated. However, this case is totally inapplicable to the case *sub judice* for two very compelling reasons.

As already explained, the State trial court judge held a hearing on the question of the private communications of

juror John Wann. The nonexistence of a hearing to determine the circumstances and impact of the private juror communication in *Remmer*, supra, was the precise reason why the case was reversed. The existence of a hearing herein accomplished the exact objectives outlined as necessary by the *Remmer* court, i.e. to determine the circumstances of the private communication, the impact thereof upon the juror, and whether or not it was prejudicial. *Remmer v. United States*, supra, 98 L.Ed. 654 at p. 656. Since a hearing was held as heretofore described, *Remmer*, supra, is inapplicable. Moreover, the existence of a hearing such as the one conducted here is a viable and valid feature upon which to distinguish *Remmer*, supra. *United States v. Love*, 535 F.2d 1152 (9th Cir. 1976).

Additionally, *Remmer*, supra, and its resulting burden on the government only applies in situations where the private communication related to matters pending before the jury, that is matters dealing with the jury's determination of guilt or innocence. Since the private communications here in no conceivable way dealt with these type matters, *Remmer*, supra, is inapplicable. See *United States v. Burke*, 496 F.2d 373 (5th Cir. 1974) and *Parrott v. State of Arkansas*, 497 F.2d 1123 (8th Cir. 1974) where the court refused to apply *Remmer* because the private conversations did not relate to matters pending before the jury.

As stated, there are scores of cases dealing with private communications between a juror and a third party. A few examples will suffice to illustrate that the complained of conduct herein did not prejudice Petitioner or deprive him of a trial by an impartial jury.

In *United States v. Brasco*, 516 F.2d 816 (2nd Cir. 1975),

sequestered jurors made unauthorized visits to their homes, beauty parlors and barber shops and made unauthorized telephone calls. Appellant filed a motion for new trial asserting these private communications and contacts constituted error. The District Court denied the motion and the Second Circuit Court of Appeals affirmed. In doing so, the *Brasco* court observed that although these communications and contacts occurred, none related to matters pending before the jury or prejudiced the Appellant in any way. *United States v. Brasco*, supra, 516 F.2d 816 at 819.

Likewise, in *Parrott v. State of Arkansas*, 497 F.2d 1123 (8th Cir. 1974), the court held the Petitioner was not denied a fair trial where alleged private communications between jurors and prosecution witnesses did not relate to matters pending before the jury and where the jurors testified on a motion for new trial hearing that they had not discussed the case at all with the prosecution witnesses. And in *United States v. Pfingst*, 477 F.2d 177, (2nd Cir.) cert. den. 412 U.S. 941, 37 L.Ed.2d 400, 93 S.Ct. 2779 (1973) it was held that the government met its burden in showing that a communication between a juror and a United States Marshall concerning the possibility of a theft involving the juror's car was harmless.

In the important and oft quoted case of *United States v. Berger*, 433 F.2d 680 (2nd Cir. 1970) cert. den. 401 U.S. 962, 28 L.Ed.2d 246, 91 S.Ct. 970 and *Levy v. U.S.*, 401 U.S. 962, 28 L.Ed.2d. 246, 91 S.Ct. 979, reh. den. 402 U.S. 925, 28 L.Ed.2d 665, 91 S.Ct. 1367 (1971) a juror left the hotel where the sequestered jury was staying and spent the night at home with her husband. The trial court questioned the juror and learned that she had not discussed the case with anyone during her absence, therefore concluding there was

no harm done to the Appellant. This decision of the trial court was affirmed by the *Berger* court on appeal.

A case involving a juror's unauthorized use of the telephone is *Cavness v. United States*, 187 F.2d 719 (9th Cir.) cert. den. 341 U.S. 951, 95 L.Ed. 1374, 71 S.Ct. 1019 (1951). There a juror first called to say he could not take his wife to choir practice and then made a second call to arrange for locking his car. Neither call related to the case before the jury and were found not to be prejudicial to the Appellant so as to necessitate reversing Appellant's conviction.

Finally, in *United States v. Sisco*, 392 F. Supp. 1347 (W.D.Mo. 1974), the court held that no prejudice was established to warrant the granting of defendant's motion for new trial where the complained of conversation between a juror and a government witness did not relate to any matter pending before the jury. See also *United States v. Brandenburg*, 162 F.2d 980 (3rd Cir.) cert. den. 332 U.S. 769, 92 L.Ed. 2d 354, 68 S.Ct. 80 (1947); *Higgins v. United States*, 160 F.2d 222 (D.C.Cir) cert. den. 331 U.S. 822, 91 L.Ed. 1839, 67 S.Ct. 1304 (1946); *Massenberg v. United States*, 19 F.2d 62 (4th Cir. 1927); *Ellis v. Slayton*, 353 F. Supp. 1353 (W.D. Va. 1973). See Anno: "Stranger's Communication with Jury in Federal Criminal Case as Prejudicial", 98 L.Ed. 656 (1954).

The discussion on this point could go on ad infinitum. Nevertheless, Respondent would conclude by pointing out that there are as many cases from the Alabama appellate courts supporting its position as there are cases from the federal courts. See e.g. *Palmore v. State*, 283 Ala. 501, 218 So.2d 230 (1969) (Prosecutor and juror discussion shown not to involve or relate to case or any matter pending before jury,

therefore State met burden); *Arnett v. State*, 225 Ala. 8, 141 So. 717 (1932). (Juror driving third person to drug store during trial harmless where their conversation did not include anything as to defendant's guilt or effect, influence or bias the juror in his deliberations; State successfully met its burden); *Melton v. State*, 26 Ala. App. 265, 158 So. 196 (1934). (Juror went home and ate supper during trial; he talked to no one in his absence about the case, therefore State met its burden). See also *Bynum v. State*, Ala. Cr. App., 348 So.2d 804, 827 (1976) Writ Quashed, *Ex Parte Bynum*, Ala. 348 So.2d 828 (1977).

II. WHEN A STATE APPELLATE COURT HAVING EXCLUSIVE JURISDICTION OF ALL FELONIES WRITES AN OPINION AFTER FULLY ADDRESSING, CONSIDERING, AND ANALYZING ALL THE ISSUES AND SUBSTANTIAL QUESTIONS OF LAW PRESENTED, AND APPLYING THE LAW TO THE FACTS AND TESTIMONY, A CRIMINAL DEFENDANT'S FOURTEENTH AMENDMENT RIGHTS ARE NOT VIOLATED, NOR IS HE A VICTIM OF INVIDIOUS DISCRIMINATION, BECAUSE THAT OPINION IS ADVERSE TO HIM.

On what borders on the frivolous, Petitioner next argues that he was denied due process of law because he was the victim of caprice and arbitrariness at the hand, and pen, of the Alabama Court of Criminal Appeals. Petitioner argues his rights were violated because in his way of thinking the Alabama Court of Criminal Appeals avoided, concealed and stood moot on the issues he presented to them. Although Petitioner's exhortations concerning the role of appellate courts are flowery and flowing, they are nevertheless meaningless in the context of this case, for they lack both body and soul when compared to the actions of the Alabama Court of Criminal Appeals in the case *sub judice*.

What is Petitioner really saying behind the illusions and images of his pretentious rhetoric? Simply, he is urging that due process on appeal not only requires a written opinion, but one that is agreeable and to a criminal defendant's liking, one that adopts the theories and inferences argued by a criminal defendant who imagines that he has been prejudiced, the victim of erroneous rulings. Here, Petitioner would equate arbitrary and capricious exercise of power by an appellate court to every opinion written by them which makes adverse findings on claims of error submitted by a criminal defendant. Such an equation, while certainly pleasing as the savior to all criminal defendants, is intolerable and prohibitive.

Petitioner's argument in this regard seems centered on the opinion of the Alabama Court of Criminal Appeals. Whether this was his intention or not, Petitioner would be precluded from arguing that his constitutional right to due process was denied by the lack of an opinion from the Alabama Supreme Court when it quashed the writ as being improvidently granted. Like its federal counterpart, (see *Fay v. Noia*, 372 U. S. 391, 9 L.Ed.2d 837, 867, 83 S.Ct. 822 (1963) and Supreme Court Rule 19 (1)) Writ of Certiorari in Alabama is not a matter of right, but of sound judicial discretion. *Ex Parte Sellers*, 250 Ala. 87, 33 So.2d 349 (1948); *Saylor v. State*, 42 Ala. App. 666, 177 So.2d 924 (1965). Consequently, it is certainly not a matter of constitutional proportion when the Alabama Supreme Court, as was the case here, first grants the writ upon preliminary examination and then, without issuing an opinion, quashes it as being improvidently granted. Certainly, there is no constitutional requirement or necessity for a State Supreme Court to issue an opinion in either denying the writ or quashing it as being improvidently granted. Failure to do so certainly would not violate one's Fourteenth Amendment rights or be arbitrary

or capricious action resulting in invidious discrimination to a criminal defendant.

This is especially true in Alabama. The Alabama Court of Criminal Appeals has exclusive appellate jurisdiction over all felonies. Code of Ala. 1975, § 12-3-9 and Alabama Constitution of 1901, Amend. No. 328, §6.03. Exercising their jurisdiction, the Alabama Court of Criminal Appeals wrote a lengthy and well reasoned opinion fully addressing, considering, and deciding all issues presented. Based on this opinion, the submission of briefs and oral argument, the Alabama Supreme Court quashed the writ as being improvidently granted without authoring an opinion. Therefore, this is not a situation where there is no opinion at all, but to the contrary a situation where one appellate court chose not to write an opinion in light of an already extensive opinion covering the same issues written by an appellate court with exclusive appellate jurisdiction.

Importantly enough, this Honorable Court oftentimes, in the face of opinions written either by federal district courts or federal circuit court of appeals, or both, denies certiorari without opinion. See Supreme Court Rule 25 (2). It is hardly suggested that this denies criminal defendants their Fourteenth Amendment rights or is invidiously discriminatory. It is hardly suggested that this is purposeful avoidance, concealment or silence by this Court on issues properly raised and submitted in Petitions for Writ of Certiorari.

We now turn to the specific allegations raised by Petitioner. He claims in two instances the Alabama Court of Criminal Appeals failed and refused to meet and deal with properly presented substantial questions of law. In citing these two instances, Petitioner is really in effect arguing that

the Alabama Court of Criminal Appeals incorrectly decided the issues raised. He cites cases to apparently show this Honorable Court that the Alabama Court of Criminal Appeals erred in deciding the substantial questions of law the way they did. Instead of arguing failure and refusal to consider issues, Petitioner is arguing about the propriety and correctness of the Alabama Court of Criminal Appeals' ruling, not the absence or failure thereof.

Respondent will not take the time to argue with Petitioner that these issues were all correctly and properly decided. Suffice it to say, the Alabama Court of Criminal Appeals and the Alabama Supreme Court both felt that there was no merit in these contentions of Petitioner's. We rest on the wisdom and prudent deliberations of these bodies.

Petitioner tells us first that his right to due process of law was violated because the Court of Criminal Appeals ignored, evaded and covered-up by silence the issue of the introduction of independent crimes to show motive. Let us look at the opinion to see if this is true.

The Court of Appeals first explained the positions of both the Petitioner and the Respondent regarding the introduction of the motive evidence. *Bynum v. State,* Ala. Cr. App., 348 So.2d 804, 818 (1976) Writ Quashed, *Ex Parte Bynum,* Ala. 348 So.2d 828 (1977). The court then went on to explain the law in Alabama and the place of motive evidence in homicide cases, its importance in cases where the evidence is partly circumstantial and partly direct, as was the situation here, and the propriety of proving the same through the introduction of evidence showing the commission of another crime. *Bynum v. State,* supra, 348 So.2d 804 at pp. 818-819. The court then applied the prevailing law to the evidence and

testimony, concluding that the evidence concerning motive was properly admitted, the court citing many cases in support of their position. *Bynum v. State,* supra, 348 So.2d 804, at pp. 819-820.

On rehearing, it was pointed out to the court that they were mistaken in part of their analysis concerning the roles of various individuals, including the victim Judge Loy Campbell, in the crimes introduced to show motive. Instead of ducking the issue, avoiding the issue, failing to meet the issue or refusing to meet the issue, the court admitted it was wrong and corrected its opinion. It then applied the law to these corrected facts and again concluded, citing new cases and relying on the ones in their original opinion, that the motive evidence was properly admitted. *Bynum v. State,* supra, 348 So.2d 804, at p. 828.

The Respondent contends that the actions of the Alabama Court of Criminal Appeals described above can hardly be classified as avoidance, silence, evasion or obfuscation. Neither can they be classified as failure or refusal to meet and deal with properly presented substantial questions of law. Rather, they show that the issue was fully considered, analyzed and decided; admittedly adverse to the now frustrated Petitioner.

Petitioner's second self-proclaimed instance of the Alabama Court of Criminal Appeals refusing and failing to meet and deal with issues raised involves a refused jury instruction dealing with the presumption of innocence as evidence. Again, however, we find that the Alabama Court of Criminal Appeals squarely met and dealt with this issue.

The court had the entire oral charge of the trial court before them and could therefore compare pertinent portions

of that charge to the refused charges of Petitioner. After employing this process, the court concluded the oral charge sufficiently and substantially covered the principles of law contained in the refused charge. *Bynum v. State*, supra, 348 So.2d 804 at p. 827. Consequently, under Alabama law, there was no error in refusing the requested charge. *Kemp v. State*, 278 Ala. 637, 179 So.2d 767 (1965); *Murray v. State*, 49 Ala. App. 590, 274 So.2d 365 (1973); *Henderson v State*, 49 Ala. App. 275, 270 So.2d 822 (1972); *Gordon v. State*, 40 Ala. App. 214, 111 So. 2d 329, reversed 268 Ala. 517, 110 So. 2d 334 (1959); Code of Ala. 1975, §12-16-13. Not being satisfied with this holding, and disguising it in cries of avoidance and cover-up, Petitioner now attempts to substitute his opinion as to whether the oral charge substantially covers the refused charge for that of the Alabama Court of Criminal Appeals. In doing so, we see Petitioner's claim of denial of constitutional rights being based pitifully on a difference of opinion, rather than any authority or precedent.

In this regard we bring to this Honorable Court's attention an Alabama Supreme Court case directly in point. In *Gordon v. State*, 40 Ala. App. 214, 111 So. 2d 329, reversed 268 Ala. 517, 110 So. 2d 334 (1959), the Alabama Supreme Court held that an oral charge almost identical to the one given herein sufficiently covered the principle of law contained in a refused requested charge which was identical to the refused charge herein, i.e., Defendant's Requested Charge No. 44. In the *Gordon*, supra, oral charge, as in the oral charge here, the presumption of innocence was meticulously explained but never described as being a matter of evidence, an explanation that Petitioner asserts is absolutely necessary for a fair trial. In dismissing Petitioner's claim that it was error to refuse requested charge No. 44, the Alabama Court of Criminal Appeals cited *Gordon*, supra. *Bynum v. State*,

supra, 348 So. 2d 804, 827. Citing such a case certainly cannot be construed to evidence an attempt to ignore, evade, sidestep or cover-up with silence any issue.

As with the motive issue, the Alabama Court of Criminal Appeals completely met and dealt with the issue involving the refused jury charge. Once again, an issue was fully analyzed, considered, and decided by a court conscious of its duties and responsibilities, one ever mindful of its obedience to justice.

CONCLUSION

Based on all of the foregoing authority, both legal and factual, the State of Alabama, Respondent, respectfully submits that there is no merit in any of the contentions raised by Petitioner and his Petition for Writ of Certiorari to this Honorable Court ought to be and is due to be denied.

Respectfully submitted,

William J. Baxley

WILLIAM J. BAXLEY
Attorney General of Alabama
By:

James S. Ward

JAMES S. WARD
Assistant Attorney General
of Alabama

Walter S. Turner

WALTER S. TURNER
Chief Assistant Attorney
General of Alabama

CERTIFICATE OF SERVICE

I, Walter S. Turner, one of the attorneys for the Respondent and a member of the Bar of the Supreme Court of the United States, and I, James S. Ward, one of the attorneys for Respondent, hereby certify that on this 21st day of December, 1977, we did serve the requisite number of copies of the foregoing Brief and Argument of Respondent and Appendix on the Honorable James M. Fullan, Jr., Esq., Beddow, Fullan and Vowell, 900 Massey Building, Birmingham, Alabama, 35203, attorney for Petitioner, by mailing said copies to him at the aforesaid address with the postage prepaid.

James S. Ward

JAMES S. WARD
Assistant Attorney General
of Alabama

Walter S. Turner

WALTER S. TURNER
Chief Assistant Attorney
General of Alabama

250 Administrative Building
Montgomery, Alabama 36130

APPENDIX A

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the foregoing pages numbered from 835 through 838 contain full, true and correct copies of those pages in the record on appeal in the cause of Hugh Otis Bynum, Jr. v. State of Alabama, Jackson Circuit Court Number 75-CR-116, 8 Div. 667, as the same remain of record and on file in this office.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 13th day of December, 1977.

Clerk, Court of Criminal
Appeals of Alabama

JOHN WANN, AFTER HAVING BEEN FIRST DULY SWORN, TESTIFIED ON BEHALF OF THE DEFENDANT AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. BOWEN:

Q. This is Mr. John Wann?

A. Yes, sir.

Q. You served as a juror on this case, is that correct, Mr. Wann?

A. Yes, sir.

Q. During the week that you served as a juror on this case, I believe you were housed at the Holiday Inn with the other jurors, is that correct?

A. That's right.

Q. During that week, Mr. Wann, did you make or receive any telephone calls?

A. Yes, I did.

Q. All right, would you tell us who you called or who called you and what the occasion was?

A. Okay; on Tuesday night, a friend of mine that was staying there, an acquaintance which I work, he works with Bell Telephone Company in Huntsville; and that week, he was serving or working up around Stevenson somewhere installing a cable carrier, that is a telephone; and I went down to his room and talked to him for about twenty minutes, I guess. Meanwhile, while I was there, some of the guys that works with the test board at Huntsville, that works with this friend of mine, they called him to see what he was up to; because they knew he was up here and he works with them, some of the

second shift boys; and they called him: and he told them I was talking to him; so he just handed me the phone and said, "Here; say hello to them"; and that is basically all I said to them; and then when I hung up, I called my wife and said "Hello" to her for about, I don't remember what I said; but the conversation must have lasted about thirty seconds. Okay?

Q. During that week, Mr. Wann, did you ever read any newspapers or newspaper articles?

A. There was a Sunday paper in Mr. Swaim's, I believe I read the Sports Section and the Comic Section.

Q. That would have been on Easter Sunday?

A. Yeah.

Q. The day that y'all weren't deliberating?

A. Yeah.

Q. I will ask you whether or not you read this particular article, Mr. Wann; this is The Birmingham News, dated Sunday, March 30, which is Easter Sunday; and it has an article reflecting Mr. Bynum in it. Did you read that particular article?

A. No, sir; I sure didn't.

Q. Did you see anyone else on the jury reading that article, or did they discuss reading that article with you?

A. No, sir, not with me.

Q. Did you hear them discuss it with anyone else?

A. No, sir; I don't recall anyone discussing it.

Q. During the week that you served on this jury, Mr. Wann, did you observe any memeber of the jury passing any notes to anyone?

A. No, sir.

Q. Did you or did you observe any member of the jury being visited by any member of their family or friends at any time during that trial, especially on Easter Sunday.

there at the hotel?

A. Easter Sunday; no, sir, I don't recall; I don't remember anyone visiting any of us up there that Easter Sunday, then or any other time, no.

Q. Now, during the week that you served on the jury, Mr. Wann, did anyone other than another member of the jury ever discuss anything about this case with you?

A. No, sir; I don't recon anyone discussed anything about

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the case at any time with me during the week I served on the jury.

Q. Did you observe, or did anyone discuss it with any other member of the jury in your presence?

A. No, sir; I don't know of anyone discussing anything about the case.

Q. Now, out at the Holiday Inn where you were housed, is it true that they placed two jurors to a room?

A. Yes, sir.

Q. And when you would go in after dinner or retire for the day and go in your room, the jurors could walk back downstairs to the newspaper rack or wherever they wanted to go, could they not?

A. Well, I suppose they could have if they wanted to.

Q. Did you observe any of them walking around by themselves out there?

A. No, sir; I did not.

Q. Well, you, in fact, did leave your room and go down to a friend's room?

A. Yeah, it was close to you and Mr. Beddow's room.

Q. Did you observe any other jurors walking around like that without escort by one of the bailiffs?

A. No.

Q. Did you ever observe any member of the jury, including yourself, separate from the other group at lunch and

walk back to the courthouse while the rest of the group strolled around town or anything like that?

A. I don't recall, Mr. Bowen; I don't remember; I just don't remember it at all.

Q. Did you ever watch any television news broadcast concerning this particular case?

A. No, sir.

Q. Or any other case?

A. No, I don't think so. The news, we saw from Chattanooga; and I don't remember anything about Mr. Bynum's case ever being mentioned on the TV.

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Q. Y'all did watch television, movies and so forth?

A. Oh, yeah; there wasn't anything else to do.

MR. BOWEN:

I believe that's all. Thank you.

CROSS EXAMINATION

BY MR. YUNG:

Q. Mr. Wann, what day of the trial was it that you saw your friend at the motel?

A. Tuesday night.

Q. You say you were in his room about twenty minutes?

A. Yeah, twenty or thirty minutes; yeah, I sat down and had a casual conversation with him.

Q. Did he mention the trial to you at all?

A. No, he didn't.

Q. Any of the people you spoke to on the phone mention the trial to you?

A. No, other than they knew I was on jury duty.

Q. Did you say anything to them about the trial?

A. Not one word at all.

MR. YUNG:

No further questions.

MR. BOWEN:

That's all.

(Thereupon, the witness was excused from the courtroom.)